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In the

# Supreme Court of the United States

October Term, 1996

RAYMOND SCHUVER AND STEVEN SCHUVER,
*Petitioners*,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Respondent*.

On Petition for a Writ of Certiorari
to the Iowa Supreme Court

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the express preemption provision of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, preempt state-law claims for money damages caused by a product regulated under the Act?

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RAYMOND SCHUVER AND STEVEN SCHUVER,
*Petitioners*,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Respondent*.

On Petition for a Writ of Certiorari
to the Iowa Supreme Court

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Raymond Schuver and Steven Schuver hereby petition for review of a ruling of the Iowa Supreme Court concerning damages to petitioners' farmland and crops caused by respondent's herbicide. The Iowa Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which expressly preempts state "requirements for labeling and packaging in addition to or different from" requirements under FIFRA, preempted petitioners' state-law claims for negligence based on manufacture, testing, sale, and notification, for strict liability, and for implied warranty.

After the Iowa Supreme Court issued its decision, this Court issued its ruling in *Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625 (U.S. June 26, 1996). Because the decision below is inconsistent with *Medtronic*, the petition for

*certiorari* should be granted and the case vacated and remanded to the Iowa Supreme Court.

## OPINIONS BELOW

The opinion of the Iowa Supreme Court is reported at 546 N.W.2d 610 (Iowa 1996), and is reproduced in the appendix at 1a. The unreported decision of the Iowa District Court for O'Brien County is reproduced at 15a.

## JURISDICTION

The judgment of the Iowa Supreme Court was entered on April 17, 1996. This petition is being filed within 90 days thereafter. This Court has jurisdiction over the petition under 28 U.S.C. § 1257(a).

## STATUTE INVOLVED

Section 24 of FIFRA, 7 U.S.C. § 136v, provides in pertinent part:

> Authority of States
>
> (a) In general - A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.
>
> (b) Uniformity - Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act.

## STATEMENT OF THE CASE

### A. The Structure of FIFRA

FIFRA's preemption provision, § 136v(b), can be construed only in the context of FIFRA's substantive requirements. FIFRA is the federal component of a tripartite scheme in which pesticides are regulated at the federal, state, and local levels. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). FIFRA requires that the federal Environmental Protection Agency ("EPA") make certain regulatory decisions regarding pesticides, but the Act rarely forbids a state or local government from supplementing EPA decisions. For example, a pesticide may generally not be sold or used in the United States without an EPA registration. 7 U.S.C. § 136a(a). Although states generally may not permit the sale or use of any pesticide not registered with EPA, states may regulate or even ban the sale and use of a federally registered pesticide. 7 U.S.C. § 136v(a). In this way, federal pesticide regulation establishes a floor that may be exceeded by additional state regulations.

Unlike federal statutes governing cigarettes and smokeless tobacco, FIFRA does not mandate precise wording for pesticide labels. *Cf.* 15 U.S.C. §§ 1333, 4402(a)(1). Nor do EPA's regulations dictate the specific language to be used for the majority of pesticide labels.[1] Rather, as part of

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[1] EPA requires signal words ("warning" or "caution") for four toxicity categories and precise precautionary statements for three. 40 C.F.R. § 156.10(h). The warnings and precautionary statements in connection with these categories generally must appear verbatim on the label.

an application for a pesticide registration, the manufacturer submits not only efficacy, health, and environmental data, but also a draft label. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). In this regard, EPA has made clear that "[t]he registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15,956 (May 4, 1988).

FIFRA and EPA do establish certain minimum requirements for pesticide labels. Pesticide labels must contain an EPA registration number, the registrant's name and address, the pesticide's name, brand, or trademark, the net weight or other measure of content, the use classification of the pesticide, an ingredient statement, directions for use, a warning or cautionary statement that is adequate to protect health and the environment, and, for pesticides that are highly toxic to humans, *see supra* note 1, specific warnings and a description of appropriate first-aid treatment. 7 U.S.C. § 136(q)(1)(D),(G) & (2)(A)-(D); 40 C.F.R. § 156.10(a)(1). Any information required under FIFRA to be on a pesticide's label must be prominently and conspicuously placed in comparison to other labeling information that is not federally mandated. 7 U.S.C. § 136(q)(1)(E); 40 C.F.R. § 156.10(a)(2).

Compliance with FIFRA's general labeling requirements does not necessarily satisfy the registrant's FIFRA (or other) obligations. To the contrary, a pesticide is misbranded if, notwithstanding EPA's registration of the pesticide and acceptance of the label, it fails to contain whatever additional warnings are necessary to protect against unreasonable adverse health and environmental effects. 7

U.S.C. § 136(q)(1)(F)-(G). Indeed, EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Neither FIFRA nor EPA regulations prohibits the inclusion of additional label information or warnings, provided that the information does not violate any specific statutory or regulatory requirement. *Id.*

With respect to directions for use, pesticide labels must contain directions necessary to effectuate the product's intended purpose and adequate to protect against fraud, personal injury, and unreasonable health and environmental effects. 7 U.S.C. § 136(q)(1)(F); 40 C.F.R. § 156.10(i)(1)(i). Under EPA regulations, directions for use must specifically identify the crops to be treated, the dosage rate associated with each site and pest, instructions for dilution, other application instructions needed to obtain effective results, and "[a]ny limitations or restrictions on use to prevent unreasonable adverse effects," including rotational crop restrictions. *Id.* § 156.10(i)(2)(iii),(iv),(vi),(vii),(x).

Because EPA depends so heavily on manufacturer submissions, FIFRA imposes continuing obligations on registrants to submit complete, up-to-date information to EPA. Registrants have ongoing obligations to provide to EPA all factual information that they have regarding unreasonable adverse environmental effects, 7 U.S.C. § 136d(a)(2), and ongoing obligations to ensure that their labeling complies with FIFRA's requirements. 7 U.S.C. §§ 136(q), 136j(a)(1)(E).

Although § 136v(b) preempts state "labeling or packaging" requirements "in addition to or different from" FIFRA requirements, the Act expressly leaves manufacturers of registered pesticides many other unrestricted means of conveying information to purchasers and users. For example, EPA's regulations identify the following means of conveying information: "[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail; [n]ewspapers, magazines, newsletters and other material in circulation or available to the public; [b]roadcast media such as radio and television; [t]elephone advertising; and [b]illboards and posters." 40 C.F.R. § 152.168(b). Unlike labeling, manufacturers do not submit such materials to EPA for review and approval as part of the registration process.[2]

If a pesticide label contains false or misleading statements or lacks directions for use and warnings that are adequate to protect health and the environment, the pesticide is misbranded. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E), 136j(a)(2)(C) & (M). In an administrative action to cancel a pesticide's registration or to seize or bar use or sale, EPA registration is not a defense. 7 U.S.C. §§ 136(q)(1)(A), 136a(f)(2). Violations warranting EPA action include labeling that lacks required information and products that cause unreasonable environmental effects even when used as

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[2] The submitted labeling is limited to "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers," or other detached written matter accompanying the pesticide, such as an instructional booklet, that serves the same purpose as a label. 7 U.S.C. § 136(p)(1) & (2)(A).

directed on the label. 7 U.S.C. §§ 136j & 136k; *see also id.* § 136l (authorizing civil & criminal penalties for FIFRA violations).

FIFRA provides no remedy to compensate individuals who sustain damages from pesticide use.

### B. Facts and Trial Court Proceedings

Raymond Schuver, a farmer in O'Brien County, Iowa, rotated his cropland between soybeans and corn. In 1988, 1989, and 1990, Schuver applied to his soybean crop the herbicide Preview, manufactured by respondent E.I. DuPont De Nemours and Company ("DuPont") and sold to him by Sanborn Cooperative Grain Company ("Sanborn"). The "Directions for Use" on Preview's box stated that field corn could be planted 10 months after Preview was applied to soybeans. Schuver applied the herbicide in accordance with these Directions for Use. Iowa Supreme Court Appendix ("Iowa App.") 70.

In 1989, Schuver noticed problems with his corn crop. That year, he sustained a loss of yield to his corn crop of 49 bushels per acre. In the years from 1990 through 1992 and in 1994, he or his son, petitioner Steven Schuver, who rented the farm from his father from 1991 through the filing of the lawsuit, sustained a loss of yield of from 32 to 41

bushels per acre.[3] Those losses represented 20 to 30 percent of the farm's expected corn crop. Iowa App. 71.

The reduced yield in corn was apparently due to the residual carryover effect of using Preview, which lasted well beyond the 10-month period stated on the product's label. In fact, because of the residual carryover problem associated with use of Preview in O'Brien County, DuPont stopped recommending Preview for use in O'Brien County after the 1990 crop season. Iowa App. 72-73.

On March 1, 1993, petitioners filed suit against DuPont and Sanborn. Iowa App. 1. They claimed a loss of corn crop, permanent damage to the farmland, and a substantial reduction in fair market value of the land as a consequence of the residual effect of Preview. The complaint alleged against both defendants causes of action for negligence, strict liability, and implied warranty, and alleged an express warranty claim solely against Sanborn. Iowa App. 1-7.

More specifically, petitioners alleged that DuPont acted negligently in (1) marketing in O'Brien County, where DuPont knew or should have known that soil types were susceptible to Preview residual carryover, (2) failing to withdraw Preview from sale in O'Brien county after learning of the crop damage caused by Preview in the county, (3) failing to test Preview in O'Brien County soil types before releasing the product for sale in the county, and (4) failing

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[3] In 1993, excessive flooding caused poor crop yields in the area farms. Petitioners did not seek damages related to the 1993 yield.

to notify in a timely manner O'Brien County farmers of the propensity of Preview to carry over. 8a.

DuPont filed a motion for summary judgment, which the district court granted on November 17, 1994. 15a. The court dismissed each of the Schuver's claims against DuPont based on either federal preemption or state-law grounds. 17a-20a. The case proceeded to trial against Sanborn. On December 16, 1994, a jury returned a verdict in favor of the Schuvers, but for only a portion of the damages claimed. Sanborn did not appeal. 3a.

### C. The Decision of the Iowa Supreme Court

The Schuvers appealed the grant of summary judgment in favor of DuPont. The Iowa Supreme Court found each of the claims expressly preempted by FIFRA and, therefore, affirmed summary judgment in favor of DuPont.

The Court began its preemption analysis by briefly reviewing FIFRA's and EPA's registration requirements, such as submission of language for the product's labeling that addresses topics including ingredients, directions for use, and adverse effects of the products. 5a. The Court then focused on FIFRA's preemption provision, 7 U.S.C. § 136v(b). 6a. The Court cited its recent decision in *Clubine v. American Cyanamid Co.*, 534 N.W.2d 385 (Iowa 1995), which held that "state actions based on the adequacy of warnings or instructions on the labels of EPA-registered pesticides are preempted" by § 136v(b). *Id.* at 387; *see* 6a-7a. *Clubine* held that claims alleging defective product, breach of express and implied warranty, and failure-to-warn were all "label-

based" and, therefore, preempted by FIFRA. 534 N.W.2d at 387.

Because the Schuvers' implied warranty claim was preempted under *Clubine*, the Court turned to consideration of the negligence and strict liability claims, which were not disposed of by *Clubine*. 7a. The Court held that the four components of the negligence claim were all based on the theory that DuPont's labels should have warned against using Preview in O'Brien County. Because the claim was "not based solely upon Du Pont's testing or research practices with regard to whether the product properly functioned," the Court held that the negligence claim was in fact a failure-to-warn claim, which was preempted by FIFRA under *Clubine*. 12a.

The Court held that the strict liability claim was also label-based, as it was premised on the theory that Preview should not be used in O'Brien County because of the soil's high pH levels. 12a-13a. The Court also noted a lack of evidence that Preview was defective or unreasonably dangerous under Iowa law. 13a. The Court did not discuss state-law grounds for dismissal of the other claims.

## REASON FOR GRANTING THE WRIT

### THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *MEDTRONIC, INC. v. LOHR.*

The Iowa Supreme Court's decision is flatly inconsistent with this Court's decision in *Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625 (U.S. June 26, 1996), which was

issued after the decision below. This Court should therefore grant this petition, vacate the decision below, and remand this case to the Iowa Supreme Court for reconsideration in light of *Medtronic*.

In *Medtronic*, this Court considered a preemption provision strikingly similar in key ways to the provision at issue here. *Medtronic* involved § 360k(a) of the Medical Device Amendments of 1976 ("MDA"), which provided for preemption of state "requirements" "different from, or in addition to" federal requirements applicable to medical devices. 21 U.S.C. § 360k(a). Like the MDA, FIFRA preempts only certain state "requirements" that are "in addition to or different from those required under this [Act]." *Id.* § 136v(b). But FIFRA's preemption provision is narrower than the MDA's, as § 136v(b) preempts only certain "labeling and packaging" requirements. At least three aspects of *Medtronic* are relevant here.

1. The Court in *Medtronic* unanimously agreed that § 360k(a) did not preempt state requirements "equal to, or substantially identical to" federal requirements. 64 U.S.L.W. at 4632-33; *id.* at 4637 (O'Connor, J., concurring in part and dissenting in part). Accordingly, where a state-law damages claim alleges failure to comply with a federal requirement or failure to comply with a common-law duty that is equivalent to a federal requirement, the phrase "different from, or in addition to" does not preempt that claim.

In this case, petitioners' claims are based on state-law duties equivalent to duties imposed by FIFRA. For example, FIFRA requires pesticide registrants to ensure that their

labels and directions for use are adequate to protect against unreasonable adverse effects, including harm to crops. 7 U.S.C. § 136a(c)(5). Pesticides that lack adequate warning labels are misbranded, even if EPA approved the label. *Id.* §§ 136(q)(1)(G), 136a(f)(2).

Petitioners alleged that respondent knew or should have known that Preview would cause crop damage in O'Brien County, and that it was negligent in marketing its product in the county, in its testing, and in failing to timely notify farmers in the county of the risk of using Preview. The common-law duties on which those allegations were based mimic the manufacturer's duties under FIFRA, which places the burden of testing, identifying, and labeling as to risks on the manufacturer.

Thus, to the extent that petitioners' claims are based on duties "equal to, or substantially identical to" requirements imposed under FIFRA, they are not "in addition to or different from" FIFRA's requirements. Even if the Iowa Court were correct in recasting each of petitioners' claims as a labeling claim, their claims would not be preempted under the reasoning of *Medtronic*.[4]

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[4] Lower court decisions prior to *Lohr* conflict as to whether FIFRA preempts damages actions based on non-compliance with FIFRA. *See, e.g., Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993) (claims for breach of FIFRA duties not preempted); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) (all state-law claims preempted).

2. Looking to the general language of the MDA's preemption provision, the Court in *Medtronic* identified an "over-arching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." 64 U.S.L.W. at 4634. Here, FIFRA expressly allows, even encourages, state and local governments to play an active role in pesticide regulation. *See supra* p. 2. Congress' expectation that state and local regulation would supplement federal regulation argues strongly against a broad reading of § 136v(b).

More specifically, in considering negligent manufacturing and failure-to-warn claims, this Court in *Medtronic* made "a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations." 64 U.S.L.W. at 4634. The Court concluded that the federal manufacturing and labeling requirements were "important but entirely generic" regulatory concerns, not the type of concerns which § 360k(a) was designed to protect from potentially contradictory state requirements. Similarly, the general common-law duties at issue in *Medtronic* were not developed specifically with respect to devices. Thus, the Court found that those duties were not the kind of requirements that Congress or the FDA feared might impede the FDA's implementation and enforcement of the MDA. *Id.*

Like the MDA's good manufacturing requirements and general labeling requirements at issue in *Medtronic*, FIFRA's labeling requirements are general. The manufacturer, not the EPA, devises a label in accordance

with the Act's general standards. And in contrast to the statutorily prescribed warnings of the Public Health Cigarette Smoking Act of 1969 ("Cigarette Act of 1969"), *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 (1992), pesticide registrants are obliged under FIFRA to update their labels to protect against adverse environmental effects. *See* 7 U.S.C. § 136d(a)(2).

Again, key language in FIFRA's preemption provision is virtually identical to language in the MDA's preemption provision. *Medtronic*'s holding is thus directly applicable to this case. The generality of FIFRA's labeling requirements, the general nature of the common-law duties at issue, and the flexibility that FIFRA and the EPA give to manufacturers to draft and revise labeling illustrate that Congress did not fear that damages actions would interfere with enforcement of FIFRA.

3. In addition, the decision below cannot be squared with general supremacy clause jurisprudence or the relevant provisions of FIFRA. In *Medtronic*, as in *Cipollone*, the Court's analysis was guided by two fundamental principles. First, the Court narrowly construed the precise language of the preemption provision in light of the presumption against preemption. 64 U.S.L.W. at 4629. Second, the Court sought to discern Congress' intent, looking primarily to the structure and purpose of the statute as a whole. *Id.* at 4629-30. Here, a fair but narrow reading of the FIFRA preemption provision reveals that Congress did not intend preemption of damages claims at all, much less the broad preemption of claims found by the Iowa Supreme Court. Such a reading is consistent with this Court's only FIFRA preemption case, *Wisconsin Public Intervenor v. Mortier*,

501 U.S. 597 (1991), which held that not only states but also local governments were free to supplement federal regulation of pesticide use.

Neither FIFRA nor its legislative history provides any evidence that Congress intended to preempt state damages actions. FIFRA places full responsibility on the manufacturer to provide adequate warnings and directions for use on its product's label. 7 U.S.C. § 136a(c)(5). FIFRA prescribes only general requirements for pesticide labels and leaves it to the manufacturer to devise a label that will adequately protect against adverse effects, including damage to land and crops. *Id.* §§ 136(j), 136a(c)(5); 40 C.F.R. § 156.10(i)(2)(iii),(vi),(vii),(x). If a registrant learns of inadequacies in the label after EPA has registered its pesticide, the registrant must promptly inform EPA of the inadequacies and revise its label to provide adequate warnings and directions for use. 7 U.S.C. § 136a(f)(1). Thus, respondent was not only free at any time to provide information to purchasers and users that would have enabled petitioners to avoid damage to their farmland and crops, respondent was obligated under FIFRA to do so.

The legislative history does not mention preemption of state damages claims. *See, e.g.*, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. Further, by beginning § 136v(b) with the words "such states," Congress tied the preemption provision to § 136v(a), which addresses states' general authority to "regulate" the sale and use of pesticides. Subsection (a) does not address states' authority to offer compensation through damages remedies. *Cf. Cipollone*, 505 U.S. at 519, 523 (in statute at issue, "'regulation' most

naturally refers to positive enactments" of legislatures and agencies, "not to common-law damages actions").

Moreover, FIFRA's preemption provision is limited to labeling and packaging requirements. *See Cipollone*, 505 U.S. at 524-30 (distinguishing, for preemption purposes, between common-law claims directly related to preempted domain and common-law claims grounded in more general duties less relevant to that domain). Therefore, even if § 136v(b) did preempt some state damages actions, it would preempt only failure-to-warn claims, not negligent testing, sale, or marketing claims, implied warranty claims based on fitness for sale or use, or design defect and manufacturing claims.

The Iowa Supreme Court therefore erred in following other FIFRA decisions that applied *Cipollone* in a rote manner, without significant attention to FIFRA's text, structure, and legislative purpose.[5] These indicia of congressional intent counsel against the Iowa Court's decision. In particular, the generality of FIFRA's labeling requirements and the authority FIFRA expressly allows states to supplement federal pesticide regulations starkly distinguish FIFRA from the Cigarette Act of 1969, at issue in *Cipollone*, and mandate the conclusion that FIFRA does not preempt damages claims.

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[5] *See, e.g., Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Clubine v. American Cyanamid Co.*, 534 N.W.2d 385, 387 (Iowa 1995).

## CONCLUSION

The petition for a writ of certiorari should be granted and the case vacated and remanded in light of *Medtronic, Inc. v. Lohr*.

Respectfully submitted,

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# APPENDIX

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CLERK SUPREME COURT

**IN THE SUPREME COURT OF IOWA**
No. 56 / 94-2081
Filed April 17, 1996

**RAYMOND SCHUVER and STEVEN SCHUVER,**

Appellants,

vs.

**E.I. DU PONT DE NEMOURS & COMPANY (INC.),**

Appellee,

and

SANBORN COOPERATIVE GRAIN COMPANY,

Defendant.

---

Appeal from the Iowa District Court for O'Brien County, James D. Scott, Judge.

Appeal from adverse summary judgment ruling on farmers' claims against herbicide manufacturer for reduced corn yields allegedly caused by residual carryover effect of herbicide. **AFFIRMED.**

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellants.

Donald J. Hemphill of the Hemphill Law Office, Spencer, and Raymond Michael Ripple, Wilmington, Delaware, for appellee.

Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Ternus, JJ.

**LAVORATO, Justice.**

Father and son farmers appeal from an adverse summary judgment ruling on all claims against the manufacturer of a herbicide based on successive reductions in corn yields. The farmers contend the reductions in corn yields resulted from the residual carryover effect of applying the herbicide to soybeans planted in rotation with the corn.

The district court concluded that federal law preempted some of the claims and concluded the remaining claims lacked merit. We affirm the ruling because we conclude federal law preempted all of the claims.

I. *Background Facts.*

O'Brien County farmer Raymond Schuver applied the herbicide Preview to his soybean crop in three successive years: 1988, 1989, and 1990. E.I. Du Pont de Nemours and Co. manufactured Preview. Sanborn Cooperative Grain Company sold the herbicide to Raymond. Raymond did not read Du Pont's application directions before applying Preview. He used Preview under normal growing conditions.

Raymond rotated his cropland yearly between soybeans and corn. In 1989 he began to notice problems with his corn crop. He had planted the corn on lands sown to soybeans the previous year.

This problem persisted into the 1990 growing season. At this time Raymond discussed the problem with Sanborn's agronomist. The agronomist told Raymond that Raymond's neighbor had experienced similar damage to his corn crop. The agronomist attributed this damage to the residual carryover effects of applying Preview to soybeans planted on the same ground in the prior year. "Residual carryover

effect" means the length of time an application of a pesticide might harm subsequently planted crops.

Raymond retired from farming in 1991. He rented his land to his son Steven on a cash basis. Steven farmed Raymond's land in 1991, 1992, 1993, and 1994. Steven did not use Preview on any of his crops. Nevertheless, Steven suffered damage to his corn crops because of the residual carryover effect from Raymond's use of Preview.

II. *Background Proceedings.*

The Schuvers filed a four-count petition against Du Pont and Sanborn. Count I alleged the defendants were negligent in the manufacture and sale of Preview to Raymond. Count II alleged a strict liability claim against the defendants because Preview was defective and unreasonably dangerous. Count III alleged the defendants impliedly warranted Preview to be merchantable and fit for its intended purpose. Count IV alleged Sanborn expressly warranted to Raymond that Preview was the proper herbicide for the Schuvers to use on their farms.

Following the defendants' separate answers, the district court granted Du Pont's summary judgment motion—over the Schuvers' resistance—on all three counts against it. The case against Sanborn proceeded to a jury trial. The jury awarded damages against Sanborn and in favor of Raymond for crop damages and reduction in the fair market value of his land. The jury awarded crop damages to Steven. Sanborn is not involved in this appeal.

The case is before us on the Schuvers' appeal from the district court's summary judgment ruling against the Schuvers and in favor of Du Pont.

III. *Scope of Review.*

Our review of the grant or denial of summary judgment is at law. Iowa R. App. P. 4. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237. In determining whether a genuine issue of material fact exists, we look at the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Id.* The moving party carries the burden to show the absence of a material fact issue, and the resisting party is afforded every inference reasonably deducible from the evidence. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). We must determine on appeal whether (1) a genuine issue of material fact exists, and (2) the law was correctly applied. *Id.*

IV. *Federal Preemption.*

The federal preemption doctrine is based on the Supremacy Clause of the federal constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. A state court lacks subject matter jurisdiction to hear any matter that is federally preempted. *Clubine v. American Cyanamid Co.*, 534 N.W.2d 385, 386 (Iowa 1995).

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is a comprehensive federal statute regulating pesticide use, sales, and labeling. *Taylor AG Indus. v.*

*Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995). The FIFRA places enforcement authority in the Environmental Protection Agency (EPA). *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601, 111 S. Ct. 2476, 2480, 115 L. Ed. 2d 532, 540 (1991).

In addition,

> all pesticides sold in the United States must be registered with the Environmental Protection Agency (EPA). 'The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides.' FIFRA establishes a complex process of EPA review that culminates in the approval of a label under which a product may be marketed. Manufacturers must submit draft label language addressing a number of different topics, including ingredients, directions for use, and adverse effects of the products, and a final label must be submitted to the EPA prior to registration.

*Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995) (citations omitted).

Before the EPA will allow a pesticide to be registered with it, the EPA administrator must determine whether:

> (A) its composition is such as to warrant the proposed claims for it;
> (B) its labeling and other material required to be submitted comply with the requirements of [FIFRA];

(C) it will perform its intended function without unreasonably adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5)(A)-(D) (1994). Federal law additionally mandates that pesticide labels include (1) warnings and precautionary statements, and (2) directions for use. 40 C.F.R. §§ 156.10(h), (i) (1995).

The FIFRA contains an express preemption clause regarding labeling requirements:

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). It is undisputed that Preview is a pesticide registered with the EPA.

Following the holdings of a number of federal circuits, we recently held that "state actions based on the adequacy of warnings or instructions on the labels of EPA-registered pesticides are preempted" under the Preemption Clause. *Clubine*, 534 N.W.2d at 387.

In *Clubine*, several farmers sued two herbicide manufacturers for crop damage. They alleged claims for strict liability, implied warranty of merchantability, express warranty, and negligent failure to test, label, and provide adequate instructions and warnings regarding use of their

herbicides. With the exception of negligent testing, we held that the FIFRA preempted all of these claims:

> We conclude the trial court correctly ruled that it could not reach the merits of plaintiffs' claims. Under the statutory definition those claims are label-based, and, because they depend on requirements in addition to—or different from —those imposed under FIFRA, are preempted. Each of the claims (that the herbicides were defective and unreasonably dangerous, that they breached an implied warranty of merchantability, and that they breached an express warranty) is derived from the assertion of factual matters FIFRA expressly places within the exclusive dominion of the EPA. The trial court was correct in so holding.

*Clubine*, 534 N.W.2d at 387.

We also held that the trial court was correct in dismissing the negligent testing claim for failure of proof. The plaintiffs produced no evidence of negligent testing on the part of the defendants. *Id.* at 387-88.

We decided *Clubine* after the parties here had completed their briefing. So the parties did not discuss *Clubine* in their briefs. The parties, however, did discuss *Clubine* in oral arguments. Counsel for the Schuvers conceded that the Schuvers' implied warranty claims are preempted under our holding in *Clubine*. But counsel refused to concede that the Schuvers' negligence and strict liability claims are preempted. Counsel argued that (1) contrary to our holding in *Clubine*, the negligence claims here are not label-based, and (2) as to the strict liability claims, our holding in *Clubine* is dictum. Not surprisingly,

counsel for Du Pont argued that our holding in *Clubine* supports preemption of all of the Schuvers' claims.

Given this posture of the case, we limit our preemption discussion to the Schuvers' negligence and strict liability claims.

A. *Negligence claims*. Consistent with the brief, the Schuvers' counsel argued the negligence claims against Du Pont are not based solely on the inadequacy of the Preview label. Counsel argued that Du Pont was negligent in four respects:

1. in marketing Preview in O'Brien County, Iowa, when Du Pont knew or should have known that soil types in O'Brien County were susceptible to Preview residual carryover;
2. in failing to withdraw Preview in a timely manner from sale in O'Brien county after learning of the crop damage caused by Preview in that county;
3. in failing to test Preview in O'Brien County soil types before releasing Preview for sale in O'Brien County;
4. in failing to notify in a timely manner O'Brien County farmers of the propensity of Preview to carry over.

These allegations of negligence rest upon an alleged improper or inadequate testing or marketing claim. We think this is merely another way of arguing that Du Pont's labels should have warned against using Preview in O'Brien County. This failure to warn claim is clearly preempted by the FIFRA.

One court reached the same conclusion in analogous circumstances. *See Hue v. Farmboy Spray Co.*, 896 P.2d

682, 692-93 (Wash. 1995) (en banc). The facts in *Hue* were these. Landowners sued, among others, a pesticide manufacturer. They alleged that a cloud of pesticides—formed from many individual applications on wheat farms—had drifted onto their homes and farms, damaging their crops and plants. The pesticide label contained detailed instructions and warnings as to the maximum amount of pesticides to be used, the need for extreme care to avoid drift, and how to safely use the pesticides under particular conditions and circumstances. *Hue*, 896 P.2d at 684-85.

The *Hue* court first determined that the FIFRA preempted the plaintiffs' product liability claims based on inadequate warnings:

> Plaintiffs' claim based upon inadequate warnings or instructions is predicated upon a state duty to provide warnings and instructions that are necessary to make a product reasonably safe. Clearly, this duty constitutes a requirement for labeling or packaging in addition to or different from the information required under FIFRA. *The gist of plaintiffs' case is that pesticides like those at issue here should not be used in an area like the Horse Heaven Hills/Badger Canyon ecosystem, where there is a risk of long distance drift or mass air contamination. Clearly, this sort of caution should go on the label.* The labels for the pesticides at issue in this case contain dozens of detailed warnings and instructions, including warnings for specific states, warnings to use "extreme caution" to avoid drift if desirable plants are "downwind," even under low wind conditions, and specific instructions as to how to

> avoid drift. Therefore, the plaintiffs' inadequate warnings claim was correctly ruled preempted by the trial court.

*Id.* at 692 (citation omitted) (emphasis added).

Turning its attention to the plaintiffs' negligence claims based upon inadequate testing and marketing, the Hue court likewise ruled that the FIFRA preempted this claim:

> The trial court also correctly held that plaintiffs' "negligence" claim against [the manufacturer] was preempted. The plaintiffs' negligence theory is not clearly articulated. The "negligence" claim against [the manufacturer] *resting upon alleged improper or inadequate testing or marketing was merely another way of contending that the labels should have warned against use in the Horse Heaven Hills or long distance drift. As the United States Supreme court ruled in Cipollone, the "negligence" claim in this case which was predicated upon the manufacturer's alleged deficiencies in testing and marketing was, in actuality, a "failure to warn" claim, that is preempted.*

*Id.* at 692-93 (citation omitted) (emphasis added).

Here the Preview label provides the following warning:

**PRECAUTIONS**

> **Do not apply "Preview" Herbicide to soils with a pH greater than 6.8.**
>
> CAUTION: Soil pH varies greatly even within the same field. pH variations as much as 2 pH units are common when the soil has a calcareous

> sub soil. Determine soil pH by laboratory analysis using a 1:1 soil:water suspension.

It is undisputed that if Preview is used on soils with a pH higher than 6.8, carryover damage can result. The gist of the Schuvers' four allegations of negligence is that Preview should not be used in O'Brien County because the land in this county has a tendency to have a pH greater than 6.8. As *Hue* points out, this sort of caution should go on the label. As mentioned, the label already cautions that Preview should not be applied to soils with a pH greater than 6.8. The claims of negligence against Du Pont are therefore preempted because they require—on Du Pont's label—additional or different information from that required under the FIFRA. *See Taylor*, 54 F.3d at 560 ("FIFRA preempts a common law claim if the legal duty that forms the basis for the claim imposes a state labeling requirement that is different from or in addition to the requirements imposed by FIFRA."); *Clubine*, 534 N.W.2d at 387 (farmers' claims that herbicides were defective and unreasonably dangerous and that manufacturers breached implied warranty of merchantability and express warranty were expressly preempted by FIFRA; farmers' claims were label-based and depended on requirements in addition to or different from those imposed under FIFRA).

The FIFRA does not preempt all negligent testing claims. *Taylor* makes the following distinction:

> The Supreme Court in Cipollone held that a negligent testing claim based on a failure to warn theory is preempted because such a claim would "require a showing that [the manufacturers'] advertising or promotions should have included additional, or more clearly stated, warnings. . . ." Claims for negligent testing that are based solely upon the manufacturers' testing or

> research practices, not related to advertising or promotion, however, are not preempted by FIFRA.
>
> The only evidence that appellants offer in support of their assertion that the manufacturers failed to test adequately the defoliants is the allegedly inadequate product labels themselves. In short, the core of appellants' claim is that the manufacturers failed to mark accurately their labels. Such an allegation requires a showing that the labels should have included additional warnings and is preempted by FIFRA.

*Taylor*, 54 F.3d at 561-62 (citations omitted). As mentioned, the four allegations of negligence here are label-based. They are not based solely upon Du Pont's testing or research practices with regard to whether the product properly functioned.

B. *Strict liability claim.* In their brief the Schuvers state their strict liability claim this way: "[the] Schuvers' strict liability claim against Du Pont. . . is premised on [the] Schuvers' assertion that Preview was unreasonably dangerous for use on O'Brien County, Iowa farms, since O'Brien County had a large percentage of farms with high soil pH levels." The petition alleges that "Preview was defective and unreasonably dangerous by reason of its design, testing, inspection, manufacture and failure of warnings."

As with the negligence claims, the strict liability claim is label-based. As with the negligence claims, the gist of the strict liability claim is that Preview should not be used on land in O'Brien County because of the high pH levels there. Again, this is the kind of information that should be on the label.

The challenge is really to the adequacy of the label. Requiring this additional information would be imposing a requirement "in addition to—or different from—those imposed under FIFRA." *Clubine*, 534 N.W.2d at 387. For this reason, the strict liability claim is preempted under the FIFRA.

In addition, there is no record evidence that Preview was in a defective condition or unreasonably dangerous as those terms are used for strict liability purposes. A product is in a defective condition "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 916 (Iowa 1990) (quoting comment *g* to section 402A of the Restatement (Second) of Torts (1976)).

> Strict liability applies
>
> only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics. . . . That is not what is meant by "unreasonably dangerous". . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

*Id.* at 916-17 (quoting comment *i* to section 402A of the Restatement (Second) of Torts)).

The label cautioned that (1) Preview should not be applied to soils with a pH greater then 6.8, (2) soil pH varies greatly even within the same field, and (3) soil pH should be determined by laboratory analysis. Presumably, Preview would be safe to use on soils with a pH less than 6.8. So Preview was not dangerous to an extent beyond that which would be contemplated by the ordinary consumer armed with that knowledge. Using Preview on soil with a pH greater than 6.8 or using Preview without determining pH by laboratory analysis would constitute a misuse of the product. In short, the Schuvers generated no genuine issue of material fact on their claim of strict liability.

V. *Disposition.*

The district court correctly sustained Du Pont's motion for summary judgment as to all of the Schuvers' claims. The FIFRA preempted those claims. Because the claims are preempted, our courts have no jurisdiction to hear the merits. Additionally, the Schuvers generated no genuine issue of material fact as to their strict liability claim. We therefore affirm.

**AFFIRMED.**

FILED
O'BRIEN COUNTY IOWA
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IN THE IOWA DISTRICT COURT FOR
O'BRIEN COUNTY

| | |
|---|---|
| RAYMOND SCHUVER and STEVEN SCHUVER,<br><br>Plaintiffs,<br><br>vs.<br><br>E.I. DU PONT DE NEMOURS AND COMPANY (INC.); and SANBORN COOPERATIVE GRAIN COMPANY,<br><br>Defendants. | LAW NO. 17809<br><br>RULING RE:<br><br>MOTION FOR SUMMARY JUDGMENT OF DEFENDANT DU PONT<br><br>(filed August 15, 1994) |

On October 10, 1994, Defendant Du Pont's Motion for Summary Judgment came on for hearing. Donald J. Hemphill appeared for Du Pont; Michael R. Bovee appeared for Plaintiffs. Now having considered the arguments of counsel, the Court rules as follows:

## NATURE OF ACTION

In 1988, 1989 and 1990, Raymond Schuver applied Preview Herbicide to farmland in O'Brien County, Iowa. The herbicide was manufactured by Du Pont and sold to Raymond by Sanborn Coop. Raymond Schuver farmed the land during the 1988, 1989, and 1990 crop years; Steven Schuver farmed the land during the 1991 and 1992 crop years.

Raymond and Steven Schuver sued Du Pont and Sanborn Coop., claiming that Preview Herbicide had a residual carryover effect. They alleged that the Preview carryover damaged corn grown during the 1989-1992 crop years. Plaintiffs brought three claims against Du Pont: (1) negligence, (2) product defect, and (3) breach of implied warranty.

Defendant Du Pont seeks summary judgment, claiming: (1) its warranty disclaimer and damages limitation clause preclude Plaintiffs' claims, (2) its damages limitation clause restricts Plaintiffs' remedy to the amount Raymond paid for the Preview, and (3) Plaintiffs' cause of action is cognizable only as a contract-warranty claim. Defendant claims that no material issue of fact exists and that it is entitled to judgment as a matter of law.

## ORDER AND RULING

### 1. SUMMARY JUDGMENT

Summary judgment is proper, if the entire record before the court shows that there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). The record includes the pleadings, depositions, answers to interrogatories, admissions on file, motion for summary judgment, resistance, affidavits and exhibits. *Id.*; *IBP, Inc. v. DCS Sanitation Management*, 498 N.W.2d 425, 426 (Iowa Ct. App. 1993). In ruling in a motion for summary judgment, the Court must examine the record in the light most favorable to the party opposing summary judgment. *Sanbulte v. Farm Bureau Mut. Ins.*, 343 N.W.2d 457, 464 (Iowa 1984).

The moving party has the burden to show that no issue of material fact exists. *Papas Clark*, 494 N.W.2d 245, 247 (Iowa Ct. App. 1992). The party resisting summary judgment, however, must set forth specific material facts in dispute and show that there is a genuine issue for trial. Iowa R.Civ.P. 237(e) (1995); *James v. Swiss Valley AG Service*, 449 N.W.2d 886, 888 (Iowa Ct. App. 1989). If reasonable minds could reach different conclusions, an issue of fact exists and summary judgment is inappropriate. *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982).

## 2. JURISDICTION

Plaintiffs' claims based on Du Pont's failure to provide adequate warning are pre-empted the by Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *See* 7 U.S.C. Sec. 136v(b) (1993). As part of their negligence and strict product liability claims, Plaintiffs allege that Du Pont failed to adequately warn them about the possible carryover effects of Preview. (Petition Count III; Resistance part VI). These claims are based on the inadequacy of Du Pont's labels. FIFRA preempts state law claims based on the inadequacy of herbicide labels. *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993).

Preemption by federal law precludes this Court from having subject matter jurisdiction. *See Brown v. Garman*, 364 N.W.2d 566 (Iowa 1985); *Walles v. International Bhd. of Elec. Workers*, 252 N.W.2d 701, 710 (Iowa 1977). Subject matter jurisdiction cannot be acquired through waiver or consent. *Campbell v. Iowa Beer & Liquor Control Dep't.*, 366 N.W.2d 574, 576 (Iowa 1985). This Court possesses the inherent power to determine whether it has

jurisdiction and has a duty to refuse to decide controversies not properly before it. *Id.*

## 3. TORT CLAIMS

Du Pont alleges that Plaintiffs' negligence and strict liability claims seek purely economic damages (crop losses), while Plaintiffs maintain that their tort claims seek damages for the physical harm done to their property (corn crops). The real issue, however, is whether Plaintiffs' cause of action is cognizable in tort or in contract. *See Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 122-25 (Iowa 1988). The following factors aid in drawing the line between contract and tort: (1) the nature of the product's defect, (2) the type of risk involved, and (3) the manner in which the injury arose. *Id.* at 124.

Plaintiffs' cause of action is cognizable in contract, not tort. *See Id.* at 122-25. The damage to Plaintiffs' crops was a foreseeable result of either Preview's failure to work properly or Preview's application to soil with too high of a pH level. Du Pont warned of the risk to rotational crops on the container label and in the directions for use. (R. Schuver Aff. Ex. A, B). The harm to Plaintiffs' crops did not result from a sudden or dangerous occurrence. Like in *Nelson*, the losses involved in this case relate to Plaintiffs' disappointed expectations. *See Nelson*, 426 N.W.2d at 122-25.

## 4. IMPLIED WARRANTY

Du Pont's disclaimer precludes Plaintiffs' breach of implied warranty claims. A seller can exclude an implied warranty of merchantability, if (1) the disclaimer's language mentions "merchantability" and (2) the disclaimer, if written, is conspicuous. Iowa Code Sec. 554.2316(2) (1993). To exclude an implied warranty of fitness, the disclaimer must be in writing and conspicuous. *Id.*

### a. WARRANTY OF MERCHANTABILITY

Du Pont's disclaimer effectively negates the implied warranty of merchantability. *See Id.* It states: "DU PONT MAKES NO WARRANTIES OF **MERCHANTABILITY** OR FITNESS ..." (R. Schuver Aff. Ex. B) (emphasis added). Whether the disclaimer is conspicuous is an issue of law for the court to decide. Iowa Code Sec. 554.1201(10) (1993).

Du Pont's disclaimer is conspicuous. *See Id.* A clause is conspicuous when written so a reasonable person should have noticed it; language is conspicuous when placed in larger or other contrasting print. *Id.* Du Pont's disclaimer is set off in a box near the beginning of the directions for use. (R. Schuver Aff. Ex. B). The heading **"NOTICE OF WARRANTY"** is in bold capital letters, and the disclaimer language, itself, is in all capital letters. (R. Schuver Aff. Ex. B). The Preview label refers purchasers to the directions for use in all capital letters, and a reasonable purchaser would read those instructions before using the herbicide. (R. Schuver Aff. Ex. A). Du Pont's placement of the disclaimer in the directions for use, rather than on the container label, does not make the disclaimer inconspicuous. *See LWT, Inc. v. Childers*, 19 F.3d 539, 543 (10th Cir. 1994); *Adams v. American Cyanamid Co.*, 498 N.W.2d 577, 585-86 (Neb. Ct. App. 1992).

### b. WARRANTY OF FITNESS

Du Pont's disclaimer effectively negates the implied warranty of fitness. *See* Iowa Code Sec. 554.2316(2) (1993). The disclaimer is in writing and mentions "fitness." (R. Shuver Aff. Ex. B). It is also conspicuous, as stated above. *See supra* part 3(a).

### c. DISCLAIMER'S APPLICATION TO STEVEN SCHUVER

Du Pont's disclaimer applies to Steven Schuver and precludes his implied warranty claim. *See* Iowa Code Sec. 554.2318 (1993). A seller's warranty extends to any person who can reasonably be expected to be affected by the goods and who is injured by a breach of warranty. *Id.* Although the operation of this section cannot be excluded or limited, any disclaimer under Sec. 554.2316 also extends to third party beneficiaries under Sec. 554.2318. *Id.* cmt. 1. Absent third party beneficiary status, Steven has no breach of implied warranty claim. *See Khabbaz v. Swartz*, 319 N.W.2d 279, 284 (Iowa 1982).

## 5. EXPRESS WARRANTY

Plaintiffs argue that Du Pont's disclaimer is inconsistent with an express warranty created by Preview's directions for use and is, therefore, negated. (Resistance part I). A disclaimer, however, is only negated to the extent that it is inconsistent with an express warranty. Iowa Code Sec. 554.2316(1) (1993). Since Plaintiffs brought no express warranty claim, their argument is irrelevant to the issues properly before this Court.

## ORDER

IT IS ACCORDINGLY ORDERED, ADJUDGED, AND DECREED that Defendant Du Pont's August 15, 1994, Motion for Summary Judgment is sustained. Plaintiff's Petition as to Du Pont is dismissed, and court costs shall be assessed against Plaintiff.

SO ORDERED on this 15th day of November, 1994

BY THE COURT:

James D. Scott /sig/
HON. JAMES D. SCOTT, JUDGE
THIRD JUDICIAL DISTRICT OF IOWA